

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board concludes the award should be modified. Claimant is awarded benefits for a disability of 7 percent to the whole person.

Findings of Fact

1. On December 15, 1997, claimant fell and injured his right knee when his right foot caught in the bars of respondent's cafeteria table.
2. Claimant reported the injury and respondent sent him to Dr. Christopher W. Siwek, an orthopedic surgeon. Dr. Siwek diagnosed medial collateral ligament strain. Dr. Siwek prescribed physical therapy, medication, home exercises, hot packs, ice, and an air splint. On January 9, 1998, Dr. Siwek released claimant to return to work with no restrictions.
3. When he returned to his work, claimant's job required that he stand and pull pieces of meat, sometimes weighing over 100 pounds, off a conveyor or belt. For approximately a day and a half after returning to work, claimant had little problem. He then started having pain in his right knee and eventually in the right hip and back. As a result of the pain in his right knee, he stood with his weight on his left leg.
4. The pain in claimant's back became worse on one occasion when he leaned forward to catch a piece of meat. Claimant did not recall the date of this event. Respondent has denied receiving notice of this event. Mr. Darren Johnson, respondent's personnel manager, testified he did not recall receiving notice of this event and later testified that claimant did not give notice of this event. But the claimant testified, and the Board finds, claimant did give notice to Mr. Johnson and, as he testified, "told my boss to give me a few minutes."¹ Claimant's Application for Hearing, filed in September 1998, makes written claim for injury to the back.
5. The Board finds claimant has not proven any permanent injury to his knee from the alleged injury. Two physicians testified in this case—Dr. Siwek, the treating physician, and Dr. Pedro A. Murati, who examined claimant at the request of claimant's counsel. Both found no permanent impairment in claimant's right lower extremity. Dr. George G. Fluter, the court-appointed independent medical examiner, submitted a report. His report concludes claimant has several "possible" problems with the right knee, including grade I sprain of the medial and lateral collateral ligaments, injury to the right meniscal cartilages, posterior cruciate ligament injury, synovial plica of the right knee, and pes anserina tendinitis. But Dr. Fluter gives no opinion about permanent impairment. Although claimant

¹ Regular Hearing, p. 14

has testified to continuing problems with his right knee, the record does not establish that claimant has a permanent impairment.

6. The Board finds claimant has proven permanent impairment from injury to his low back. The history in the medical records is generally consistent with claimant's testimony regarding development of the back pain. Dr. Siwek released claimant to return to work without restrictions January 9, 1998. Dr. Siwek saw claimant next on January 23, 1998, and at this visit claimant complained of, in addition to knee problems, pain along the right hip area radiating down to the right leg. Although the records for subsequent visits do not, in many cases, mention back pain, the records do include reference to back pain. The notes from the March 6 visit indicate claimant "started to complain of back pain."² Because of the back complaints, Dr. Siwek suggested claimant change his work habits. On April 3, claimant returned with complaints of persistent back pain. At this visit, claimant advised Dr. Siwek that there was no work available with respondent that allowed him to change his work habits as recommended.

7. Dr. Murati examined claimant October 28, 1998. Although, as indicated, he found no permanent impairment in the lower extremity, Dr. Murati did find permanent impairment in claimant's back. He assigned a 7 percent impairment rating using the Fourth Edition of the *AMA Guides to the Evaluation of Permanent Impairment*. This is the only rating in the record.

8. Dr. Flutter, the court-appointed independent medical examiner, diagnosed lumbar sprain/strain. His report does not address permanency or give any opinions on impairment. He does attribute the low back problems to injury at work. His report states:

It seems most likely that altered biomechanics resulting from the injury to the right lower extremity may have contributed to the back pain.

9. The Board concludes claimant has a 7 percent permanent partial impairment as a result of the altered biomechanics resulting from the injury to the knee aggravated by the specific incident at work pulling beef off the line. Although Dr. Siwek concluded claimant has no permanent impairment, the claimant's testimony is supported by the report from the court-appointed medical examiner and by Dr. Murati.

10. The Board finds respondent terminated claimant for cause, unexcused absences. Claimant injured his hand in an accident that was not work related. He told his employer and was advised to seek medical help. Claimant did not get medical attention and the hand became worse. Respondent's policy requires that employees off on sick leave for more than three days provide a physician's excuse and report daily. Claimant did neither and was terminated for that reason.

² Dr. Siwek deposition, p. 8

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a).
2. Claimant has not met his burden of proving permanent impairment to the right lower extremity.
3. Claimant has proven a 7 percent permanent partial disability to the whole person for injury to the low back. K.S.A. 1999 Supp. 44-510e.
4. Claimant gave timely notice and made timely written claim. The Board finds the back injury was a direct and natural result of the temporary knee injury and as such requires no new notice or separate notice or written claim. In addition, the back injury was a gradually developing injury continuing while claimant worked for respondent. As a separate injury, the date of accident would be the last day worked.
5. Claimant was terminated for cause and has not proven that he would not otherwise continue to earn a comparable wage in employment for respondent. As a result, he is not entitled to a work disability award. K.S.A. 44-510e. *Ramirez v. Excel Corporation*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied ___ Kan. ___ (1999). The award should be limited to the 7 percent disability based on functional impairment.
6. Respondent's motion to strike Exhibit B to claimant's brief is moot. The Board has based its decision on the medical testimony in the record.
7. Claimant is entitled to unauthorized medical expense up to the statutory maximum upon presentation to respondent's insurance carrier showing the amount of such expenses incurred. Claimant is entitled to future medical expenses upon application to and approval by the Director.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge John D. Clark on February 4, 2000, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Francisco Galindo, and against the respondent, Prairieland Processors, Inc., and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred December 15, 1997, and based upon an average weekly wage of \$365.80, for 4 weeks of

temporary total disability compensation at the rate of \$243.88³ per week or \$975.52, followed by 29.05 weeks at the rate of \$243.88 per week or \$7,084.71, for a 7% permanent partial disability, making a total award of \$8,060.23, all of which is presently due and owing in one lump sum, less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of July 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Wichita, KS
William L. Townsley, III, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director

³ The weekly rate used by the Board differs by approximately \$10 from the rate used by the ALJ as it appears there was a minor calculation error in the Award.